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IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

THE SUPREME COURT OF TEXAS
CASE NO.: 99-1303
COURT OF APPEALS NO.: 14-98-00059-CV
TRIAL COURT NO.: 96-56183

NORWEGIAN CRUISE LINE LIMITED d/b/a
NORWEGIAN CRUISE LINE,

Petitioner,

v.

KENT STOBAUGH, NANCY STOBAUGH,
RICHARD HEIDBRINK and DORIS HEIDBRINK,

Respondents.

PETITION FOR WRIT OF CERTIORARI
(with Appendix)

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4/pp

QUESTION PRESENTED FOR REVIEW

Whether the public policy interest of a state in providing its citizens with a forum in which to resolve civil disputes, as articulated in Section 71.051(f)(1), Texas Statutes, permits a state court to defy federal law as articulated by the Supreme Court and to preempt an analysis of fundamental fairness as defined by federal law.

CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioner certifies that the following persons and entities have or may have an interest in the outcome of this case.

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6. Respondents Kent and Nancy Stobaugh

7. Respondents Richard and Doris Heidbrink

JURISDICTIONAL STATEMENT

Jurisdiction is proper pursuant to 28 U.S.C. 1257. The underlying opinion rendered by the Court of Appeal, Fourteenth District, was filed on July 29, 1999. The Texas Supreme Court denied NCL's petition for certiorari on March 9, 2000. The exercise of jurisdiction by state courts over cases encompassing issues of federal law is subject to the condition that state courts interpret and faithfully enforce the supreme law of the land in order to secure state compliance with and national uniformity of federal law. When a state court fails to comply with that condition, the state court's decision is subject to review by the United States Supreme Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW ii

CERTIFICATE OF INTERESTED PERSONS iii

JURISDICTIONAL STATEMENT v

TABLE OF CONTENTS vi

TABLE OF AUTHORITIES vii

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT 5

CONCLUSION 9

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

Cases

Carnival Cruise Inc. v Shute,
499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991)passim

Corna v. American Hawaii Cruises, Inc.,
794 F. Supp. 1005, 1010-1012 (D. Hawaii 1992)..... 7

Cross v. Kloster Cruise Lines, Limited,
897 F. Supp. 1304 (D. Oregon 1995)..... 6

DeCarlo v. Italian Line,
16 F. Supp. 136 (S.D.N.Y. 1976)..... 6

Gomez v. Royal Caribbean Cruise Lines,
964 F. Supp. 47 (D. P.R. 1997) 8

Lousararian v. Royal Caribbean Corp.,
1992 A.M.C. 1339 (1st Cir. 1992)..... 6

Marek v. Marpan Two Inc., 817 F.2d 242 (3rd Cir.)
cert. denied, 484 U.S. 852, 108 S. Ct. 155, 98 L.Ed. 2d 110
(1987) 6, 8

Schaff v. Sun Line Cruises, Inc., 999 F. Supp.
924 (S.D. Tex. 1998)..... 7

Stobaugh v. Norwegian Cruise Line Limited,
5 S.W. 3d 232 (Tx. App. 1999) .....passim

Other Authorities

Section 71.051(f)(1), Texas Statutes ..... ii, 1
28 U.S.C. 1257 v

STATEMENT OF THE CASE AND FACTS

This petition for certiorari arises from the opinion of a Texas Court of Appeals which found that public policy in Texas prohibited the enforcement of a forum selection clause in a passenger cruise ship ticket requiring that all lawsuits be filed in Florida, notwithstanding the clear rule of law to the contrary enunciated in *Carnival Cruise Inc. v Shute*, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991). [App. 1]. In their brief below, the passengers, purported members of a class action lawsuit, maintained that Section 71.051(f)(1), Texas Statutes, [App. 4] embodied Texas' public policy and required that the case be tried in Texas. In essence, the Texas court adopted *Shute's* dissenting opinion and held that a forum selection clause in a cruise line ticket was unenforceable because at the time that the ticket was mailed to the passenger any refund requested would have been subject to a penalty. The *Stobaugh* opinion interferes with the uniformity of federal maritime law and violates the Supremacy Clause of the United States Constitution which holds that state law which interferes or conflicts with federal law must yield to federal law. The decision has wide-ranging consequences both in the cruise industry and in all inter-state transportation which relies on forum selection clauses in carriage tickets.

In 1996, passenger Kent Stobaugh contacted his travel agent to inform her that he wanted to purchase a cruise. The travel agent mailed him copies of Norwegian Cruise Line's [NCL's] promotional cruise brochure on March 22, 1996, and June 5, 1996. [R. 28; 289]. The brochure contained important information regarding the cruise tickets that would be issued and necessary for boarding the vessel and included information regarding the cruise line's cancellation and refund policy. The brochure outlined the assessment of penalties involved for cancellation and refund penalty which depended on the number of

days the cancellation occurred prior to sailing. [R. 644-645;709-710]. The brochure also warned the passengers that acceptance of the passenger ticket constituted acceptance of its terms, and that it contained information which affected the passenger's legal rights. [R. 712].

The brochure also outlined NCL's offer to sell the passengers trip cancellation insurance.[1] [R. 646; 711]. Plaintiffs acknowledge receiving the brochure before the purchase of the cruise. [R. 515].

After reviewing the brochure and consulting with their travel agent, plaintiffs booked (and paid for their cruise through the travel agent) a seven-day New York to Bermuda cruise aboard the M/S DREAMWARD, a vessel owned by NCL. [R. 532; 154; 534]. They, however, declined to purchase cruise cancellation insurance. [R 39; 300]. The "Passenger Copy" of the Passenger Ticket Contract received and retained by the passengers included notice of a forum selection clause which required all disputes to be litigated in Dade County, Florida. [R. 533]. The reasonable communication of the forum selection clause is not in dispute. *See Shute*.

During the cruise, the ship encountered Hurricane Eduardo, which allegedly resulted in physical and emotional injuries to many of the passengers on board. On their return to Texas, the passengers filed a class action lawsuit.

NCL attempted to remove the case to federal court. The removal was unsuccessful, and the case was remanded to Texas state court. NCL moved to dismiss based on the forum selection clause.

Citing *Shute*, the state trial court held that the passengers accepted their passenger ticket contracts before the cruise and did not object to the terms and conditions of the contract and that the

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[1] It is important to note that trip cancellation insurance is available to the passengers until the day of sailing.

passengers had adequate and reasonable opportunity to apprise themselves of the ticket's terms. The court found that the passenger ticket was a maritime contract, that the forum selection clause in the ticket was valid and enforceable, and that Texas law did not govern their claims. In particular, the court held that Texas Statute Section 71.051(f)(1) was irrelevant to the enforcement of the forum selection clause. Lastly, the trial court found that there was no conflict between NCL's cancellation and refund policy and the terms of the passenger ticket contract. [App. 3]. In other words, the state trial court correctly followed the law as enunciated by this Court.

The Texas Court of Appeals reversed. Recognizing that in *Carnival Cruise Lines, Inc. v. Shute* this Court first articulated the enforceability of forum selection clauses in passenger cruise line contracts, the Texas court disingenuously avoided its mandate. It held that the forum selection clause in the NCL ticket ran afoul of the fundamental fairness test articulated in *Shute* for two reasons: one, that the NCL brochure did not specifically mention the forum selection clause and only contained a sentence warning the passenger that the ticket contract contained information which affected the passengers' legal rights, and two, that the passengers did not receive their tickets until twenty three-days (23) before the cruise departed, when some penalty would be imposed for cancellation. The Texas appellate court found that the forum selection clause did not pass muster because when its existence was made known to the passengers, they were not in a position to reject the contract with impunity.[2] Finding that Texas had a significant interest in providing its citizens with a forum in which to resolve its civil

[2] The appellate court's analysis is incorrect in its conclusion that the passengers were not able to cancel the cruise without penalty. Up until the day of sailing, Passengers were free to purchase trip cancellation insurance. The Passengers chose not to avail themselves of this option.

disputes, the Texas appellate court reversed and remanded the case for trial on the merits. *Stobaugh v. Norwegian Cruise Line Limited*, 5 S.W. 3d 232 (Tx. App. 1999). [App. 1]. The Texas Supreme Court denied certiorari. [App.2] This petition follows.

ARGUMENT

In *Carnival v. Shute*, this court refined the analysis of *The Bremen*, 407 U.S. 1, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1972) to account for the realities of a form passage contract. The Court held that a forum selection clause in a "routine" form passenger cruise line ticket, which was not subject to individual negotiation, was enforceable and fundamentally fair because the forum selection clause was not used as a means of discouraging cruise ship passengers from pursuing legitimate claims and because the passengers were given notice of the forum clause and presumably retained the option of rejecting the contact. In denying review of the Texas appellate decision, the Texas Supreme Court implicitly found that the identical situation which the United States Supreme Court found to be fundamentally fair in *Shute* would not pass muster in Texas. [App.2].

Stobaugh is factually identical to *Shute*. The passengers in *Shute*, like the cruise ship passengers in *Stobaugh*, were informed of the forum selection clause only after the ticket, printed in Florida, was mailed to them in Washington, long after the transaction was completed and before the Shutes ever saw the ticket's terms and conditions. 897 F. 2d 377, 389 (9th Cir. 1990). Thus, this Court in *Shute* determined as a matter of law that the same type of passenger ticket with the same type of forum selection clause has public policy benefits, that there are overriding national concerns which mandate enforcement of the contract, and that inconsistent and varying adjudications within the fifty states have a detrimental impact on federal law.

Under the guise of Texas public policy, the Texas appellate court has substituted its judgment with respect to fundamental fairness for that of the judgment of this Court. Attempting to create a contractual basis for the invalidation of the forum selection clause, the *Stobaugh* court, like the dissenters in *Shute*, articulates the point that the contractual language in the ticket is

fundamentally unfair because the passengers had no opportunity to reject the ticket without penalty. This emphasis on contract is the minority view in *Shute;* it is not the law in the United States. The *Shute* Court rejected the view that a contract of adhesion is unfair because the passengers cannot cancel at any time without penalty. In contrast, the dissent emphasizes that the passengers learn of the forum selection clause after the transaction is completed: "By this point, the passengers will already have accepted the conditions set forth in paragraph 16(a), which provides that "[t]he Carrier shall not be liable to make any refund to passengers in respect of...tickets wholly or partly not used by a passenger." *Shute*, 499 U.S. 585, 634 (Justice Stevenson dissenting). The adoption of the minority view is a direct violation of the state court's duty to interpret and faithfully enforce the supreme law of the land in order to secure state compliance with national uniformity of federal law. In other words, it is not permissible for Texas to fail to subordinate its view to that of federal authority.[3]

In disregarding (and in Texas, at least implicitly overruling *Shute),* Texas courts have upset the uniformity in federal maritime law, and in essence, have made Texas public policy

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[3] Moreover, the *Stobaugh* fundamental fairness test is out of step with the progeny of *Shute* –which has focused on the reasonable communication of the forum selection clause in the passenger ticket rather than the inability of the passenger to recover the full price of the passenger ticket should the forum selection clause in the ticket offend him. Indeed, the progeny of *Shute* have recognized that many (if not most of the passengers) never read the ticket. *See e.g., Cross v. Kloster Cruise Lines, Limited*, 897 F. Supp. 1304 (D. Oregon, 1995); *Lousararian v. Royal Caribbean Corp.*, 1992 A.M.C. 1339 (1st Cir. 1992); *Marek v. Marpan Two Inc.*, 817 F.2d 242 (3rd Cir.) *cert. denied*, 484 U.S. 852, 108 S. Ct. 155, 98 L.Ed. 2d 110 (1987); *DeCarlo v. Italian Line*, 16 F. Supp. 136 (S.D.N.Y. 1976). These courts have found that the ticket in hand—regardless of the timing of its receipt—controls the issue of whether the forum selction clause, or any other clause, was reasonably communicated to the passenger.

paramount over federal law. ("Parties who intend to deprive Texas citizens of the right to sue in their courts by way of a forum selection clause must give notice of that intention in an effective manner, and at a time that affords an opportunity to reject such a term without penalty. A fundamental fairness test can tolerate nothing less"). *Stobaugh v. Norwegian Cruise Line Limited*, 5 S.W. 3d 232 (Tx. App. 1999). Thus, the adoption of the *Stobaugh* test threatens the uniformity of federal maritime law: like Texas, every state may now claim that its public policy mandates a rejection of fundemental fairness as articulated by this Court. Under this circumstance, this Court should exercise its jurisdiction to determine whether a Texas statute may circumvent federal maritime law as articulated by this Court.

The *Stobaugh* opinion has wide ranging repercussions. Though the Court in *Shute* has determined that the enforcement of a forum selection clause has a salutary effect by limiting confusion regarding where suits must be brought, eliminating litigation regarding the proper forum, and reducing fares by limiting the fora where passengers may sue, the *Stobaugh* court eviscerates these benefits in Texas. Turning *Shute* on its head, it ignores both the policy articulated in *Shute* and the business exigencies of inter-state transportation industries. The opinion fails to consider that commercial transit transactions are conducted through the mail and by telephone, and that there is a lag time for the receipt of tickets. It fails to recognize that in light of internet transactions, it is possible that many passengers will not receive their tickets until the day of travel. Moreover, were the *Stobaugh* fundamental fairness test to be widely adopted in various jurisdictions,[4] transportation industries—airlines,

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[4] *See e.g. Schaff v. Sun Line Cruises, Inc.*, 999 F. Supp. 924,926-27 (S.D. Tex. 1998) (finding a forum selection clause unenforceable is fundamentally unfair because passenger had no opportunity to reject the cruise line ticket upon receipt); *Corna v. American Hawaii Cruises, Inc.*, 794 F. Supp. 1005, 1010-
Footnote cont'd

railroads, as well as cruise lines would need to address the difficulties of communication of the forum selection clause outside of the ticket itself.[5] Alternatively, should the industries modify their refund policy to allow for additional time to cancel without penalty, the difficulties of assessing capacity would necessarily increase the price of the passenger tickets. Any financial benefits which accrued to the industries on account of the forum selection clause would dissipate, and the cost of litigation in all fifty states would inevitably be passed on to the passenger. This is precisely what the *Shute* court sought to avoid.

In sum, this Court must address a state court opinion which circumvents the law as articulated by this Court, violates the Supremacy clause of the United States Constitution, threatens the uniformity of federal maritime law, and creates litgation with differing results in all fifty States. If unchecked, *Stobaugh* will increase the costs of doing business in all forms of inter-state transportation by creating litigation thoughout the country and by limiting the industries' ability to predict the number of passengers engaging their services. The result is increased costs which will be passed on to the passengers.

1012 (D. Hawaii 1992) (finding a forum selection clause unreasonable where passengers had no opportunity to reject it without penalty).

[5] By its finding that the forum selection clause in the ticket itself was fundamentally fair, *Shute* attempts to avoid litigation regarding notice of the forum selection clause by travel agents who are, as a matter of law, agents of the passenger. *See Marek v. Marpan Two Inc.*, 817 F2d 242 (3rd Cir.) *cert. denied*, 484 U.S. 852, 108 Sup. Ct. 155, 98 L.Ed. 2d 110 (1987); *Gomez v. Royal Caribbean Cruise Lines*, 964 F. Supp. 47 (D. P.R. 1997). In contrast, the view taken by the Texas courts focuses on the language in the brochure. As a result, *Stoubaugh* then encourages litigation regarding how and when the information outside of the ticket is communicated to the passengers.

CONCLUSION

Petitioner Norwegian respectfully requests that this Court grant NCL's Petition for Certiorari.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to: Houston & Shahady, P.A., Attorneys for Respondents, 316 Northeast Fourth Street, Fort Lauderdale, Florida 33301; David D. Peden, Jr., Esq., David E. Sharp., Esq., Greenberg, Peden, Siegmyer & Oshman, P.C., 12 Greenway Plaza, 10th Floor, Houston, Texas 77046, and Ted C. Litton, Esquire, 2200 Travis Street, Houston, Texas 77002 on this 6th day of June, 2000.

_____
CURTIS J. MASE

#66688/15406 V2

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

THE SUPREME COURT OF TEXAS
CASE NO.: 99-1303
COURT OF APPEALS NO.: 14-98-00059-CV
TRIAL COURT NO.: 96-56183

NORWEGIAN CRUISE LINE LIMITED d/b/a NORWEGIAN CRUISE LINE,

Petitioner,

v.

KENT STOBAUGH, NANCY STOBAUGH, RICHARD HEIDBRINK and DORIS HEIDBRINK,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX

1 - *Stobaugh v. Norwegian Cruise Line Limited, 5 S.W. 3d 232 (Tx. App. 1999)*

2 - **Letter from Supreme Court of Texas denying petition for review**

3 - **Findings of Fact and Conclusions of Law in Cause No. 96-56183**

4 - **Section 71.051(f)(1), Texas Statutes**

KENT STOBAUGH, NANCY STOBAUGH, RICHARD HEIDBRINK AND DORIS HEIDBRINK, INDIVIDUALLY AND ON BEHALF OF ALL SIMILARLY SITUATED PERSONS,

Appellants

v.

NORWEGIAN CRUISE LINE LIMITED d/b/a NORWEGIAN CRUISE LINE,

Appellee

NO. 14-98-00059-CV

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON

5 S.W.3d 232; 1999 Tex. App. LEXIS 5580

July 29, 1999, Rendered
July 29, 1999, Opinion Filed

SUBSEQUENT HISTORY: [**1] Petition for Review Denied March 9, 2000.

PRIOR HISTORY: On Appeal from the 270th District Court. Harris County, Texas.
Trial Court Cause No. 9656183. Hon. Richard Hall, Judge.

DISPOSITION: Reversed and Remanded.

APPENDIX 1

CORE TERMS: forum selection clause, passenger, brochure, cruise, ticket, refund, negotiated, fundamental fairness, cancellation, enforceability, federal maritime law, cruise line, enforceable, fundamentally unfair, unenforceable, promotional, canceled, lawsuit, sailing, sophisticated, impunity, notice, full payment, per person, contacted, sentence, modified, cancel, buried, ship

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for appellants.

Ted C. Litton, Jeffrey James Putnam of Houston, TX, for appellees.

JUDGES: Panel consists of Justices Yates, Fowler and Sondock.

n1 Senior Justice Ruby Kless Sondock sitting by assignment.

OPINION BY: RUBY KLESS SONDOCK

OPINION: [*233]
OPINION

Kent and Nancy Stobaugh and Richard and Doris Heidbrink, appellants, filed suit against Norwegian Cruise Line Limited d/b/a Norwegian Cruise Line ("NCL"), appellee, to recover damages for personal injuries suffered on NCL's cruise ship M/S Dreamward. Almost a year after suit was filed, NCL filed a Motion to Dismiss based on a forum selection clause which designated Florida as the venue for any disputes between the parties. The trial court granted the Motion to Dismiss and appellants appeal that ruling. We reverse and remand.

In the spring of 1996, appellants decided to take a cruise. The contacted their Houston travel agent and received NCL's promotional brochures. Appellants selected a seven-day cruise aboard the M/S Dreamward departing New York for Bermuda on August 31, 1996. Full payment was sent in June, but NCL did not send the appellants a passenger ticket until August 8, 1996. The [**2] ticket included a "Contract of Passage," which purported to contain all of the terms of the agreement [*234] between the parties, including the now disputed forum selection clause.

A few days before the departure date, appellants learned of several tropical storm systems and a possible hurricane in the Atlantic Ocean. Appellants contacted NCL, expressed their concerns and inquired about a refund in case they decided to cancel. NCL informed the appellants that if they canceled they would receive no refund, and that they should proceed with the trip and trust the judgment of the ship's captain. The appellants did just that, and NCL's ship proceeded to sail into Hurricane Eduardo, which allegedly resulted in physical and emotional injuries to many of the passengers on board.

Following their return to Texas, the appellants filed this class action lawsuit. NCL immediately attempted to remove the case to Federal Court, but the removal was unsuccessful and the case was remanded on May 28, 1997. Soon thereafter, a discovery dispute arose in which the NCL refused to produce discoverable material. The dispute continued until September 19, 1997, when the trial judge ruled that NCL's objections to [**3] the appellant's discovery requests were without merit. The court ordered NCL to produce the materials and pay sanctions for the delay. On October 1, 1997, nearly eleven months following the filing of the original lawsuit, and only one month before the appellant's lawsuit would be barred, n1

NCL asserted the forum selection clause as a basis for its Motion to Dismiss this lawsuit.

----------Footnotes----------

n1 In addition to the forum selection clause, the Contract of Passage also contained a requirement that any suit must be brought within one year of the injury, regardless of the applicable statute of limitations in the forum in which it is filed. The forum selected by NCL in the forum selection clause is Florida. Under Florida law, there is no savings statute. See Fla. Stat. ch. 95.051(2); <=1> Swartzman v. Harlan, 535 So. 2d 605, 607 (Fla. Dist. Ct. App. 1988). Therefore, if the forum selection clause is valid and enforceable, an injured passenger must file suit in Florida within one year of the injury.

----------End Footnotes----------

The issue presented [**4] in this appeal is the enforceability of a forum selection clause that rears its head for the first time after the appellants paid in full for a cruise selected from NCL's promotional brochure which made no reference to the clause. Appellants present two arguments to support their contention that the forum selection clause is unenforceable. First, they assert that the forum selection clause is not properly part of the contract between the parties because it is a material term that NCL added following the formation of the contract without additional consideration. Second, the appellants argue that the forum selection clause should not be enforced because it is fundamentally unfair. Since we find that enforcement of the forum selection clause in the present case is fundamentally unfair, we need not address appellants complaint that the forum selection clause is not properly a part of the contract.

The issues relating to the enforceability of a forum selection clause in a cruise line passenger ticket are issues of admiralty, and are therefore governed by federal maritime law. See <=2> Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 590, 113 L. Ed. 2d 622, 111 S. Ct. 1522 (1991). [**5] In this area, Texas recognizes that substantive federal maritime law preempts state law. See <=3> Exxon Corp. v. Choo, 881 S.W.2d 301, 304 (Tex. 1994). Accordingly, we will look to federal maritime law in our review of whether the trial court erred when it enforced the forum selection clause by granting NCL's Motion to Dismiss.

The enforceability of forum selection clauses was first addressed by the United States Supreme Court in <=4> The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1972). In The Breman, the Court upheld a forum selection clause which was part of a fully negotiated contract executed by two private international companies. <=5> Id at 2. In rejecting the argument that the forum selection clause was unfair, the Court was [*235] obviously influenced by the fact that the contract in question was "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power." <=6> Id at 12. This is evident from the almost twenty references to matters such as the fact that the choice of forum was made "in an arm's-length negotiation by experienced [**6] and sophisticated businessmen," and that the forum chosen was a "neutral forum with expertise in the subject matter." <=7> Id at 12. Texas courts have also recognized the validity of forum selection clauses negotiated between "two sophisticated parties in an arm's length commercial transaction." <=8> Accelerated Christian Educ., Inc. v. Oracle Corp., 925 S.W.2d 66, 71 (Tex. App.--Dallas 1996, no writ). There are, however, distinct differences

in the circumstances surrounding the execution of the contract in The Breman and Accelerated Christian and the passenger contract in the present case.

In Carnival Cruise Lines, Inc. v. Shute, the United States Supreme Court first recognized the difference between negotiated commercial contracts and cruise line passenger contracts, and addressed the enforceability of forum selection clauses in the latter. <=9> 499 U.S. 585, 592-93, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991). The Court acknowledged the need to "refine the analysis of The Breman to account for the realities of form passage contracts." <=10> Id at 593. The Court, however, rejected the proposition that a forum selection clause in a cruise line contract is unenforceable [**7] merely because the parties did not bargain for it in advance. <=11> Id. at 593. Instead, the Court emphasized that such clauses are subject to judicial scrutiny for fundamental fairness. See <=12> id at 595. This inquiry includes the examination of several factors, including (1) whether there is an indication that the forum was selected to discourage legitimate claims, (2) whether the accession to the forum selection clause was obtained by fraud or overreaching, (3) whether the passenger was given adequate notice of the forum selection clause, and (4) if they retained the option of rejecting the contract with impunity following notice of the forum selection clause. See id. After reviewing the record in this case, we find that the forum selection clause runs afoul of the fundamental fairness test because of both how and when NCL attempted to impose the forum selection clause upon the appellants.

Until appellants received the passenger tickets, the only terms and conditions of the agreement between the parties were those contained in NCL's brochure. The brochure did not mention the now contested forum selection clause, but rather contained only [**8] a short sentence buried on page one

hundred-eleven, the last page, which warned that "the passenger ticket contract contains information that affects your legal rights, and we recommend that you read it carefully." Similar to the location of the warning in the brochure, the forum selection clause was buried in the last paragraph on the back of the Passenger Ticket, and stated in the following minuscule print:

this Contract shall be governed in all respects by the laws of the State of Florida and the laws of the United States of America. It is hereby agreed that any and all claims, disputes or controversies whatsoever arising from or in connection with this Contract and the transportation furnished hereunder shall be commenced, filed and litigated, if at all, before a court of proper jurisdiction located in Dade County, Florida, U.S.A.

By sending in their full payment in June 1996, the appellants impliedly accepted the terms and conditions set out in NCL's promotional brochure. It was not until August 8, 1996, twenty-three days before the cruise departed, that NCL modified the agreement by including additional terms in the Contract of Passage, one of which was the forum selection [**9] clause. [*236]

As stated earlier, forum selection clauses that are negotiated are generally enforceable. Further, in some situations a forum selection clause that is not negotiated may also be enforceable. However, in such situations the law imposes the additional requirement that the non-negotiated forum selection clause be fundamentally fair to the party against whom it is being enforced. See <=13> Shute, 499 U.S. at 595. Here, the way in which NCL imposed the forum selection clause upon the appellants after they paid for the cruise in full offends our notion of fair play and does not pass the test of fundamental fairness.

Additionally, the forum selection clause does not pass muster because when its existence was made known to the appellants, they were not in a position to reject the modified contract with impunity. The brochure that enticed the appellants to purchase NCL's cruise contained its cancellation and refund policy, which stated in relevant part:

Depending on when you cancel your cruise, cancellation charges will be assessed as follows: For 5-9-day cruises, $ 100 per person when canceled 60-30 days prior to sailing; $ 200 per person when canceled 29 - 4 days [**10] prior to sailing. . . . There are no refunds for no-shows, or for cancellations that occur less than 4 days prior to sailing day.

Even assuming that NCL would have honored the refund policy outlined in the brochure, n2 NCL did not send the Contract of Passage containing the forum selection clause to the appellants in a timely manner. If the appellants had immediately read the Contract of Passage containing the forum selection clause and attempted to reject the forum selection clause on the same day it was received, each couple would have been subject to a $ 400 cancellation penalty. Such a result does not pass the fundamental fairness test prescribed in Shute and is against the public policy of this state. See <=14> Schaff v. Sun Line Cruises, Inc., 999 F. Supp. 924, 926-27 (S.D. Tex. 1998) (finding a forum selection clause unenforceable as fundamentally unfair because passenger had no option to reject the cruise contract upon receipt); <=15> Corna v. American Hawaii Cruises, Inc., 794 F. Supp. 1005, 1010-1012 (D. Hawaii 1992) (finding a forum selection clause unreasonable where passengers had no opportunity to reject without penalty).

----------Footnotes----------

n2 There is a conflict between the cancellation policy in NCL's brochure and the Contract of Passage in the passenger ticket. The express terms of the Contract of Passage state that "this contract shall be the entire agreement between the parties and supersedes all representations or conditions contained in [NCL's] advertisements [and] . . . brochures," and "carrier shall not be liable to make any refund to passenger in respect of . . . tickets wholly or partly not used by a passenger." Therefore, under the literal terms of the Contract of Passage, NCL may have had no obligation to honor the refund policy as stated in its brochure.

----------End Footnotes----------

[**11]

Texas has a significant interest in providing its citizens with a forum in which to resolve civil disputes. See <=16> Accelerated Christian Educ., Inc, 925 S.W.2d at 71 (citing <=17> Caton v. Leach Corp., 896 F.2d 939, 943 (5th Cir. 1990). If having a forum selection clause was of such import to NCL, it could have easily included it as one additional sentence in its one-hundred and eleven page brochure, thereby giving potential Texas customers fair warning that they are giving up their right to sue in a Texas court and the protections afforded them under Texas law. Parties who intend to deprive Texas citizens of the right to use their courts by way of a forum selection clause must give notice of that intention in an effective manner, and at a time that affords an opportunity to reject such a term without penalty. A fundamental fairness test can tolerate nothing less.

The judgment is reversed and remanded for trial on the merits.

/s/ Ruby Kless Sondock

Justice

Judgment rendered and Opinion filed July 29, 1999.

Panel consists of Justices Yates, Fowler and Sondock. n1

----------Footnotes----------

n1 Senior Justice Ruby Kless Sondock sitting by assignment.

----------End Footnotes----------

[**12]

#66689

March 9, 2000

Mr. Ted C. Litton
Royston, Rayzor, Vickery & Williams, L.L.P.
600 Travis, Suite 2200
Houston, TX 77002

Mr. David D. Peden, Jr.
Greenberg Peden Siegmyer & Oshman
12 Greenway Plaza, 10th Floor
Houston, TX 77046

Re: Case Number 99-1303
Court of Appeals Number: 14-98-00059-CV
Trial Court Number: 96-56183

Style: NORWEGIAN CRUISE LINE LIMITED d/b/a NORWEGIAN CRUISE LINE v. KENT STOBAUGH, NANCY STOBAUGH, RICHARD HEIDBRINK, and DORIS HEIDBRINK

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

By_____
Tanya R. Hunter
Deputy Clerk

cc: Ms. Mary Jane Gay, Clerk
Mr. Charles Bacarisse

APPENDIX 2

CAUSE NO. 96-56183

KENT STOBAUGH, NANCY STOBAUGH, RICHARD HEIDBRINK AND DORIS HEIDBRINK, Individually and on behalf of all similarly situated persons,	IN THE DISTRICT COURT
Plaintiffs,	
vs.	
NORWEGIAN CRUISE LINE LIMITED D/B/A NORWEGIAN CRUISE LINE AND K. WAGHORNE,	
Defendants	HARRIS COUNTY, TEXAS
	270TH JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs have requested that the court issue findings of fact and conclusions of law. The court is required to issue such only if they relate to ultimate or controlling issues. *Rafferty v. Finstad*, 903 S.W.2d 374, 376 (Tex. App. - Houston [1st Dist.] 1995, no writ). The court is not required to making findings or conclusions that relate merely to evidentiary matters. *Dura-Stilts Co. v. Zachry*, 697 S.W.2d 658, 661 (Tex. App. - Houston [1st

Dist.] 1985, writ ref'd n.r.e.). Therefore, it is not necessary for the court to address the issues concerning Plaintiffs' Motion to Strike the Affidavit of Jane E. Kilgour.

FINDINGS OF FACT

1. Plaintiffs purchased from Norwegian Cruise Line (hereafter "NCL") tickets for a cruise from New York to Bermuda on the passenger vessel M/S DREAMWARD departing August 31, 1996.

2. On July 17, 1996, NCL issued Plaintiffs a Passenger Ticket Contract for the subject voyage. The terms of the NCL Passenger Ticket Contract and NCL's brochure were produced by both the Plaintiffs and Defendant and there was no dispute concerning their authenticity.

3. The Passenger Ticket Contract was received by the Plaintiffs on or about August 8 or 9, 1996, more than three weeks prior to the cruise.

4. The Passenger Ticket Contract consists of two parts; the Cruise Ticket and the Passenger Copy. Both the Cruise Ticket and Passenger Copy contained a conspicuous and well-defined box of information or "Important Notice". This was printed in clear and conspicuous ink on a contrasting background and advised Plaintiffs of the importance of reading the terms and conditions of the Passenger Ticket Contract. A virtually identical warning was also printed just above the terms and conditions included in the Passenger Copy retained by Plaintiffs.

5. The terms and conditions of the Passenger Ticket Contract were printed in clear and conspicuous black ink in separately numbered clauses on both sides. The Passenger Copy advised Plaintiffs to read the terms on the back of the Passenger Ticket Contract.

6. Plaintiffs accepted their Passenger Ticket Contracts before the cruise and did not object to the terms and conditions of the Passenger Ticket Contract.

7. Clause 28 of the terms and conditions contained a routing forum selection clause which provided that:

It is hereby agreed that any and all claims, disputes or controversies whatsoever arising from or in connection with this Contract and the transportation furnished hereunder shall be commenced, filed and litigated, if at all, before a court of proper jurisdiction located in Dade County, Florida, U.S.A.

8. Plaintiffs had adequate and reasonable opportunity to apprise themselves of the terms and conditions of the Passenger Ticket Contract. *Carpenter v. Klosters Rederi A/S*, 604 F.2d 11, 13 (5th Cir. 1979) (recognizing the terms of the passenger ticket become binding on the passenger as soon as he accepts the ticket); *Colby v. Norwegian Cruise Lines, Inc.*, 921 F. Supp. 86, 88 (D. Conn. 1996) (possession of NCL passenger ticket before cruise equals notice of terms within); *Osborn v. Princess Routs, Inc.*, 1995 A.M.C. 2119, 2120 (S.D. Tex. 1995) (possession of passenger ticket prior to boarding means there was ample time to examine contents); *Lemoine v. Carnival Cruise Lines, Inc.*, 854 F. Supp. 447, 448 (E.D. La. 1994) (when passenger receives ticket they automatically have notice of its contents); *Feingold v. Cunard Line*, 757 F. Supp. 84, 86 (D.N.J. 1991) (possession of ticket equals notice of provisions within).

9. The inclusion of the Florida forum selection clause in the Passenger Ticket Contract was not the product of fraud or overreaching by NCL. There is no evidence that NCL included the Florida forum selection clause in the Passenger Ticket Contract in order to discourage the filing of legitimate claims by NCL passengers. To the contrary, NCL maintains its office in Miami, Florida, and NCL vessels sail to and from ports in Florida.

10. Plaintiffs have not met their heavy burden of proof in order to overcome enforcement of the forum selection clause.

CONCLUSIONS OF LAW

1. NCL's Passenger Ticket Contract is a maritime contract subject to the General Maritime Law. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *THE MOSES TAYLOR*, 71 U.S. (4 Wall.) 411 (1886).

2. The Florida forum selection clause contained in the Passenger Ticket Contract is *prima facie* valid and enforceable. *Shute*, 499 U.S. at 593-95; *See THE BREMEN v. Zapata Offshore Co.*, 407 U.S. 1, 10 (1972). The United States Supreme Court has recognized that: (1) it would be unreasonable to assume that passengers would negotiate the terms of a forum selection clause in their ticket; (2) common sense dictates that a cruise passage ticket of this kind would be a form contract and that the passenger would not have bargaining parity with the cruise line; (3) that cruise lines have a special interest in limiting the fora where they can be sued; (4) that a forum selection clause dispels any confusion about where suits must be brought, thereby sparing litigants time and expense on preliminary motions, as well as conserving judicial resources; and (5) that the passengers benefit from the reduced fares reflecting the savings to the cruise lines in limiting the fora where they can be sued. *Shute*, 499 U.S. at 593-94.

3. As this matter concerns the alleged breach of a maritime passenger contract, Texas law does not govern Plaintiffs' claims. See *Exxon Corp. v. Choo*, 881 S.W.2d 301, 304 (Tex. 1994); See *Texaco Ref. & Mktg., Inc. v. Estate of Dau Van Tran*, 808 S.W. 2d 61, 64 (Tex. 1991); See *Mandell & Wright v. Thomas*, 441 S.W. 2d 841, 844 (Tex. 1969). The Texas DTPA does not apply because such would create a conflict with significant principles of General Maritime Law. *Ingram Barge Co. v. Trifinery, Inc.*, 1991 A.M.C. 1450, 1460-61 (Judge Russell Lloyd, 334th District Court of Harris County, Texas) (rejecting applicability of DTPA to contract for hire of vessel

because of differing standards as to punitive damages and foreseeability in causation); *Coastal Iron Works, Inc. v. Petty Ray Geophysical*, 783 F.2d 577, 582 (5th Cir. 1986) (rejecting application of DTPA to maritime repair contract because such would have invalidated a "red-letter" clause considered valid under maritime law); *Delta Marine, Inc. v. Whaley*, 813 F. Supp. 414, 417 (E.D.N.C. 1993) (rejecting North Carolina's version of the DTPA in a maritime product liability case because an award of treble damages would conflict with the maritime law which does not recognize punitive damages). The General Maritime Law does not recognize awards of non-pecuniary or punitive damages. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32-33 (1990) (rejecting award of nonpecuniary damages under maritime law); *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1508 (5th Cir. 1995) (*en banc)* (rejecting punitive damages for contractual maintenance and cure claim); *Maritime Overseas Corp. v. Waiters*, 917 S.W.2d 17, 18-19 (Tex. 1996) (rejecting punitive damages under maritime law for contractual maintenance and cure claim and noting that the decision "reflects the aspirations of and engenders the uniformity sought in *Miles* for the recovery of nonpecuniary damages under maritime law"); *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 296-97 (Tex. 1993) (rejecting punitive damages under maritime law for unseaworthiness claim). Even if the DTPA applied, Plaintiffs do not deny that NCL was not given proper statutory (60 day) notice before filing the DTPA claim.

4. Mere allegations of fraudulent conduct or misrepresentations as to the contract as a whole are insufficient to overcome the forum selection clause. *Haynesworth v. The Corporation*, 121 F.3d 956, 963 (5th Cir. 1997). Regardless, Plaintiffs claims for negligence, misrepresentation, and violations of the Texas DTPA are sufficient related to or arise in connection with the Passenger Ticket Contract and the cruise so as to justify enforcement of the Florida forum selection clause. *Accelerated*

Christian Education, Inc. v. Oracle Corp., 925 .W.2d 66, 72 (Tex. App. - Dallas 1996, no writ) (enforcing contractual forum selection clause because plaintiffs' claims for negligent misrepresentation, violations of the Texas DTPA, fraud, and gross negligence "arise out of the parties' contractual relation and necessarily implicate the contract's terms"); see *Hoffman v. Burroughs Corp.*, 571 F. Supp. 545, 547 (N.D. Tex. 1982) (enforcing forum selection clause where plaintiffs' claim for "fraudulent inducement into contract and breach of warranties impliedly made upon entering [the] agreement [were] undoubtedly related to that agreement"). The Passenger Ticket Contract terms and conditions are necessarily implicated by the Plaintiffs' claims.

5. Common law or code *forum non conveniens* under Tex. Civ. Prac. & Rem. Code Ann. Sec. 71.051(f)(1) is irrelevant to the enforcement of the contractual forum selection clause in the Passenger Ticket Contract.

6. There is no conflict between NCL's cancellations and refund policy and the terms of the Passenger Ticket Contract. *Cross v. Kloster Cruise Lines, Limited*, 897 F. Supp. 1304, 1309 (D. Ore. 1995).

Any Conclusion of Law that constitutes a Finding of Fact is adopted as such, and any Finding of Fact that constitutes a Conclusion of Law is adopted as such.

SIGNED at Houston, Texas, this _____ day of _____, 1998.

_____

HON. J. RICHARD HALL
DISTRICT JUDGE

#66690

TEX. CIV. PRAC. & REM. CODE § 71.051 printed in FULL format.

TEXAS STATUTES AND CODES

*** THIS DOCUMENT IS CURRENT THROUGH THE 2000 SUPPLEMENT (1999 SESSION) ***

CIVIL PRACTICE AND REMEDIES CODE
TITLE 4. LIABILITY IN TORT
CHAPTER 71. WRONGFUL DEATH; SURVIVAL; INJURIES OCCURRING OUT OF STATE
SUBCHAPTER D. FORUM NON CONVENIENS

Tex. Civ. Prac. & Rem. Code § 71.051 (2000)

§ 71.051. Forum Non Conveniens

(a) With respect to a plaintiff who is not a legal resident of the United States, if a court of this state, on written motion of a party, finds that in the interest of justice a claim or action to which this section applies would be more properly heard in a forum outside this state, the court may decline to exercise jurisdiction under the doctrine of forum non conveniens and may stay or dismiss the claim or action in whole or in part on any conditions that may be just.

(b) With respect to a plaintiff who is a legal resident of the United States, on written motion of a party, a claim or action to which this section applies may be stayed or dismissed in whole or in part under the doctrine of forum non conveniens if the party seeking to stay or dismiss the claim or action proves by a preponderance of the evidence that:

(1) an alternative forum exists in which the claim or action may be tried;

(2) the alternate forum provides an adequate remedy;

(3) maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;

(4) the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;

(5) the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum; and

(6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation.

(c) The court may set terms and conditions for staying or dismissing a claim or action under this section as the interests of justice may require, giving due regard to the rights of the parties to the claim or action. If a moving party violates a term or condition of a stay or dismissal, the court shall withdraw the order staying or dismissing the claim or action and proceed as if the order had never been issued. Notwithstanding any other law, the court shall have continuing jurisdiction for purposes of this subsection.

(d) A request for stay or dismissal under this section is timely if it is filed not later than 180 days after the time required for filing a motion to transfer venue of the claim or action. The court may rule on a motion filed under this section only after a hearing with notice to all parties not

less than 21 days before the date specified for the hearing. The court shall afford all of the parties ample opportunity to obtain discovery of information relevant to the motion prior to a hearing on a motion under this section. The moving party shall have the responsibility to request and obtain a hearing on such motion at a reasonable time prior to commencement of the trial, and in no case shall the hearing be held less than 30 days prior to trial.

(e) The court may not stay or dismiss a plaintiff's claim under Subsection (b) if the plaintiff is a legal resident of this state. If an action involves both plaintiffs who are legal residents of this state and plaintiffs who are not, the court may not stay or dismiss the action under Subsection (b) if the plaintiffs who are legal residents of this state are properly joined in the action and the action arose out of a single occurrence. The court shall dismiss a claim under Subsection (b) if the court finds by a preponderance of the evidence that a party was joined solely for the purpose of obtaining or maintaining jurisdiction in this state and the party's claim would be more properly heard in a forum outside this state.

(f) A court may not stay or dismiss a claim or action pursuant to Subsection (b)

if a party opposing the motion under Subsection (b) alleges and makes a prima facie showing that an act or omission that was a proximate or producing cause of the injury or death occurred in this state. The prima facie showing need not be made by a preponderance of the evidence and shall be deemed to be satisfied if the party produces credible evidence in support of the pleading, which evidence need not be in admissible form and may

include affidavits, deposition testimony, discovery responses, or other verified evidence.

(g) Any time limit established by this section may be extended by the court at the request of any party for good cause shown.

(h) In this section:

(1) "Legal resident" means an individual who intends the specified political subdivision to be his permanent residence and who intends to return to the specified political subdivision despite temporary residence elsewhere or despite temporary absences, without regard to the individual's country of citizenship or national origin. The term does not include an individual who adopts a residence in the specified political subdivision in bad faith for purposes of avoiding the application of this section.

(2) "Plaintiff" means a party seeking recovery of damages for personal injury or wrongful death. In a cause of action in which a party seeks recovery of damages for personal injury to or the wrongful death of another person, "plaintiff" includes both that other person and the party seeking such recovery. The term does not include a counter-claimant, cross-claimant, or third-party plaintiff or a person who is assigned a cause of action for personal injury, or who accepts an appointment as a personal representative in a wrongful death action, in bad faith for purposes of affecting in any way the application of this section.

(i) This section applies to actions for personal injury or wrongful death. This section shall govern the courts of

this state in determining issues under the doctrine of forum non conveniens in the actions to which it applies, notwithstanding Section 71.031(a) or any other law.

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